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No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,

v.

GWINNETT COUNTY SCHOOL DISTRICT and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the private right of action under Title IX of the Education Amendment of 1972 excludes the traditional remedy of damages.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 911 F.2d 617 and reprinted at Pet. App. 1. The opinion of the United States District Court for the Northern District of Georgia is unreported and printed at Pet. App. 15.

JURISDICTION

The court of appeals entered judgment on September 10, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTE INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) *et seq.*, provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

STATEMENT

This case involves a high school student who seeks monetary damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), for intentional discrimination. The court of appeals affirmed the district court's dismissal of the action on the ground that such relief is not available under Title IX.[1]

1. Petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, between September 1985 and August 1989. Respondent Gwinnett County School District operates the high school and is a recipient of federal funds. According to petitioner's complaint, beginning in the fall of 1986, when she was in the tenth grade, she was subjected to a continuing course of intentional sexual harassment, culminating in forced intercourse, by Andrew Hill, a sports coach and teacher employed by the District.

During the 1986-87 school year, while petitioner was a student in his economics class, Hill would assign work to the class and then ask petitioner to come to his private office, where he would engage her in sexually oriented

[1] The listing required by Rule 29.1 of this Court is set forth in the caption of the case. Dr. William Prescott, who appears as a respondent, was named as a defendant in the complaint. Petitioner did not pursue claims against him in the court of appeals (Pet. App. 12-13), and there are no issues before this Court with respect to him.

conversation. Comp. ¶¶ 9, 10; Ex. A at 3.[2] In these conversations, Hill asked about, among other subjects, petitioner's sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man. Comp. ¶ 10. Because these sessions often caused petitioner to be late for her next class, Hill would write notes excusing her lateness or would accompany her to her class and inform her teacher that she had been with him. Comp. ¶ 13; Ex. A at 3. When petitioner confronted Hill regarding rumors that the two were having a sexual relationship, he forcibly kissed her on the mouth. Comp. ¶ 17. During the summer of 1987, Hill telephoned petitioner at her home, informed her that his wife was out of town, and suggested that the two get together. *Id.* ¶ 21; Ex. A at 4-5.

Hill resumed his pattern of harassment during the 1987-88 school year. Ex. A at 5. He would repeatedly meet petitioner after her classes and walk with her or write a note excusing her from class and take her to his office. Comp. ¶ 22; Ex. A at 5. On three occasions, between October and December 1987, Hill interrupted petitioner while she was in class, asked her teacher to excuse her, took her to a private office, and had sexual intercourse with her. Comp. ¶¶ 25, 27, 32. On one of these occasions, Hill threatened petitioner that he would disclose their relationship to her mother and boyfriend if she refused to have intercourse with him. *Id.* ¶ 27.

Several teachers and administrators at the high school were aware of Hill's sexual harassment of petitioner and other female students, but they took no action to rectify matters. *Id.* ¶¶ 23, 24. In 1986, petitioner's boyfriend told Dr. William Prescott, the school band director, that Hill frequently invited petitioner to his office, where he

[2] Petitioner filed a Complaint and an Amended Complaint in which she incorporated as Exhibit A the report of the United States Department of Education's Office of Civil Rights based on that office's investigation of the harassment involved in this case.

would initiate sexually explicit conversations, and often caused her to be late for her other classes. Prescott responded that he would write Hill a letter admonishing him for his inappropriate behavior. *Id.* ¶ 18; Ex. A at 4. In October 1987, a female student reported to an assistant principal that Hill had made inappropriate personal comments to her and that he had also sexually harassed petitioner. The assistant principal chastised the student for her allegations and took no further action. Comp. ¶ 24. Shortly thereafter, another student, supported by documentation, reported Hill's conduct to a guidance counselor. The counselor discussed the matter with an assistant principal, who advised the counselor to bring it to the attention of the principal. The student and counselor met with the principal, who assured them that he would talk with Hill. *Id.* ¶ 29. The principal later told the student that he had spoken with Hill. *Id.* ¶ 30. An assistant athletic director also met with Hill regarding the allegations against him. *Id.* ¶ 31. In February 1988, several students and a faculty member again reported to the principal that Hill had sexually harassed petitioner and others. *Id.* ¶ 33. In March 1988, petitioner herself met with the principal and confirmed that Hill had abused her. *Id.* ¶ 35.

In March 1988, the school initiated an official investigation of Hill. *Id.* ¶ 34. While the investigation was in progress, Dr. Prescott met with petitioner and attempted to pressure her into dropping the charges against Hill. Prescott told petitioner that her efforts would injure her (as well as the school's) reputation and that her name would be in the newspaper and on television. *Id.* ¶ 35; Ex. A. at 6. Prescott further sought to enlist the aid of petitioner's boyfriend to dissuade her from pursuing her grievance. Ex. A at 6. Hill also approached petitioner and told her to drop the allegations against him. *Ibid.*

In April 1988, the school's investigator concluded that the allegations against Hill were true. Comp. ¶ 36. On

April 14, 1988, Hill resigned on condition that all matters pending against him be dropped. *Id.* ¶ 37; Ex. A at 7. Upon Hill's resignation, the school closed its investigation. Comp. ¶ 37. Subsequently, Prescott resigned as well. *Id.* ¶ 6.

2. In August 1988, petitioner filed a complaint with the Office for Civil Rights ("OCR") of the United States Department of Education, charging that respondent had intentionally discriminated against her on the basis of sex in violation of Title IX. After several months of investigation, OCR found that respondent had violated petitioner's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain about conduct proscribed by Title IX. Ex. A at 7. OCR concluded, however, that because Hill and Prescott had resigned and the District had agreed to implement certain grievance procedures, the District had come back into compliance with Title IX. With no relief for petitioner, OCR terminated its investigation. *Id.* at 8-9.

3. On December 29, 1988, petitioner filed this action. The district court, relying on binding circuit-court precedent, dismissed the complaint on the ground that Title IX does not authorize an award of damages. Pet. App. 18-20 (citing *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 133 (5th Cir. 1981)); *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (decisions of the Fifth Circuit prior to Oct. 1, 1981, are binding in the Eleventh Circuit).

The Eleventh Circuit affirmed. Pet. App. 13. Recognizing that analysis of Title IX follows the law developed under Title VI of the Civil Rights of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), the court of appeals first looked to this Court's decision in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), and concluded that the absence of a majority opinion left unresolved the question whether damages were available under Title VI

for intentional discrimination. Pet. App. 9. The court of appeals next reasoned that Title IX was enacted pursuant to Congress's Spending Clause powers and that "[u]nder such statutes, relief may frequently be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction." Pet. App. 9-10 (citation omitted). The court thus concluded that, in dealing with "Spending Clause legislation[,] . . . we proceed with extreme care when we are asked to find a right to compensatory relief where Congress has not expressly-provided such a remedy as a part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary." *Id.* at 11. On this basis, the court ruled that petitioner was entitled to no relief for the violation of her Title IX right to be free of sexual abuse.[3]

SUMMARY OF ARGUMENT

This Court has repeatedly reaffirmed that Congress intended Title IX to be enforced through a private right of action. *E.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979). The question in this case is whether that private action allows for the traditional legal remedy of damages. For two reasons, the answer must be yes.

1. The question of what remedies are available under a statute that provides for a private right of action is "analytically distinct" from the prior question of whether such a right of action exists. *Davis v. Passman*, 442 U.S. 228, 239 (1972). With respect to the question of remedies, the rule has long been that all customary judicial relief, including damages, is presumptively available when Congress provides a private right of action. *See, e.g., Bell v.*

[3] Judge Johnson concurred in the judgment, concluding that the decision in *Drayden v. Needville Indep. School Dist.* "alone is dispositive of this case." Pet. App. 14.

Hood, 327 U.S. 678, 684 (1946). That rule is eminently sensible. It rests on the natural expectation that, other things being equal, when the federal courts have jurisdiction, they may exercise it fully. Such a rule also avoids the need for courts either to nullify legislation because no particular remedy is specified or to decide on an *ad hoc* basis which remedies would best further Congress's purposes. On the other hand, the concern that led this Court to restrict its implied right of action jurisprudence —*i.e.*, that courts should not be making legislative decisions that have the effect of expanding their own jurisdictional reach—evaporates once Congress decides that resort to judicial enforcement is warranted. Contrary to the view of the court below, moreover, this presumption in favor of traditional remedies applies to statutes enacted pursuant to the Spending Clause. And its application to Title IX, in particular, demonstrates that damages are an appropriate remedy for petitioner's claims of sexual harassment.

2. Even without the presumption in favor of traditional remedies, a fair reading of congressional intent indicates that Title IX allows for damages. First, at the time Congress enacted Title IX, this Court was repeatedly and consistently approving implied damages remedies as a matter of federal common law. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). It is plainly reasonable to conclude, as did the *Cannon* Court (441 U.S. at 699), that Congress was aware of and relied on this Court's approach. Second, the administrative interpretation of Title IX also supports the availability of compensatory relief "to overcome the effects of [statutorily proscribed] discrimination." 34 C.F.R. § 106.3(a). And third, in view of this Court's decisions under Title IX and its sister statutes (Title VI and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504")), holding

that injunctive and back pay remedies are available under these statutes, it makes no sense to think Congress prohibited damages: injunctions are normally a disfavored remedy; and given Title IX's core concern with *students*, it seems unlikely that Congress would have denied a compensatory remedy to them while simultaneously affording one to school *employees*, who already had such a remedy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").

ARGUMENT

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX is enforceable through an implied right of action. Following the method of *Cort v. Ash*, 422 U.S. 66, 78 (1975), the *Cannon* Court concluded that (a) Title IX has "an unmistakable focus on the benefited class," explicitly conferring the right to be free of sex discrimination (441 U.S. at 691); (b) the 1972 Congress that enacted Title IX intended it to mirror Title VI, and the clear contemporaneous understanding of Title VI was that it allowed private actions—an understanding that continued to be reflected in judicial, legislative, and executive action after 1972, for both Title VI and Title IX (441 U.S. at 694-703); (c) "[t]he award of individual relief to a private litigant" not only furthers the congressional purpose of protecting individuals against sex discrimination but is sometimes "necessary" to serve that statutory purpose, because the alternative of a fund cutoff to an entire program or institution is so severe (and harmful to the intended beneficiaries of funding) that it is often inappropriate (441 U.S. at 705-06; *see id.* at 703-08); and (d) the area of discrimination, especially by the recipients of federal funds, is not primarily a state concern but is of central *federal* concern (441 U.S. at 708-09).

Cannon thus established that Congress in Title IX had implicitly authorized the victims of sex discrimination to

bring suit against a federal grantee that discriminates—exactly as if Title IX contained an explicit provision stating: "an individual may bring an action in federal court to seek relief for violations of the provisions of this title."

The existence of this federal right of action is not disputed in this case and is, in any event, firmly settled. This Court has built on *Cannon* in recognizing implied rights of action seeking relief from discrimination by federal fund recipients under Title VI (*Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)) and under Section 504 (*Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984)). The Court's opinions, moreover, including those rejecting private rights of action, have repeatedly cited *Cannon* with approval. *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374, 381 (1982); *California v. Sierra Club*, 451 U.S. 287, 293-95 (1981); *Northwest Airlines, Inc. v. Transport Union Workers*, 451 U.S. 77, 90-92 (1981).[4] And the *Cannon* Court's approach—using the *Cort v. Ash* factors as "guides to discerning [congressional] intent" that is "implicit[] in the language or structure of the statute, or in the circumstances of its enactment"—remains the governing mode of analysis. *Thompson*, 484 U.S. at 179 (citation omitted).[5]

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[4] Indeed, Justice Powell, who dissented in *Cannon*, wrote the *Darrone* opinion building on it. And Justices Scalia and O'Connor in *Thompson* specifically exempted *Cannon* from the criticism they leveled at the *Thompson* majority's analysis. 484 U.S. at 189-90 (Scalia, J., concurring in the judgment); *id.* at 188 (O'Connor, J., concurring in part and concurring in the judgment). Justice Scalia, for himself, suggested in *Thompson* that, *"if"* the implied-right-of-action doctrine were to be changed, the doctrine should be abolished. *Id.* at 191-92.

[5] *Thompson* explained that implied rights of action are not limited to cases of drafting errors or inadvertent omissions where "Members of Congress . . . actually had in mind the creation of a

The result in *Cannon* has also been recently reaffirmed by Congress. In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under several statutes, including specifically Title IX. Congress obviously would have had no reason to do that unless Title IX contained a private right of action. In addition, Congress left *Cannon* undisturbed when it extended Title IX in 1988. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).[6] Finally, *Cannon* has proved to be neither confusing nor unworkable in any respect. In these circumstances, *Cannon* must be taken as the starting point in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[7]

Accepting *Cannon*, then, means that the sole issue here is the scope of relief available under the private right of action that Congress intended to provide. Specifically, the question is whether Title IX allows petitioner to pursue the usual remedy of damages for injuries suffered,

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private cause of action." 484 U.S. at 179. An implied right of action, like other implications from statutes, may be implicit in the text, structure, or background of a statute, even if no legislative history reveals an affirmative specific intent on the question. *Ibid.*

[6] Many of the cases discussed in the legislative history of this statute were private suits (some seeking damages). *See, e.g.*, S. Rep. No. 64, 100th Cong., 1st Sess. 10, 15 (1987).

[7] That *Cannon* leads to overlapping and somewhat different statutory discrimination remedies—a fact noted by the United States in its *amicus* brief on the petition in this case (U.S. Br. at 17-18)—is no ground for overruling the decision. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982) ("this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination"); *Cannon*, 441 U.S. at 711 (existence of alternative rights of action no ground for rejecting implied right of action); *see also Patterson*, 491 U.S. at 173-74 (similar argument rejected with regard to *Runyon* v. *McCrary*, 427 U.S. 160 (1976)); *Johnson v. Railway Express Agency*, 421 U.S. 454, 471-73 (1975).

particularly where the injunctive and "back pay" remedies that have already been recognized under the statute would be of no benefit whatever to her. In our view, there are two separate, but reinforcing, reasons to conclude that such damages are available. First, there is the well-settled statutory presumption that, when Congress authorizes a private right of action, it intends to allow all appropriate, traditional forms of judicial relief, unless it indicates otherwise, which it has not done here. Second, an independent evaluation of congressional intent under Title IX confirms the availability of a damages remedy.

I. ALL APPROPRIATE REMEDIES ARE PRESUMPTIVELY AVAILABLE TO EFFECTUATE A CONGRESSIONALLY AUTHORIZED RIGHT OF ACTION.

The question whether an implied right of action exists—and thereby creates jurisdiction over cases that would not otherwise be in court—is quite different from the question of what remedies may be awarded once the plaintiff is authorized to bring suit. On the question of remedies, which is the issue in this case, "[t]he usual rule is that where legal rights have been invaded *and a cause of action is available*, a federal court may use *any available remedy to afford full relief*." *Guardians*, 463 U.S. at 595 (opinion of White, J.) (emphasis added). Thus, once Congress has authorized a private right of action, the courts should presume that full enforcement is available unless Congress indicates otherwise—which it has not done with respect to Title IX. Contrary to the conclusion of the court of appeals in this case, moreover, the decision in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), does not abrogate that settled principle in Spending Clause cases.

A. This Court long ago recognized that it is "well settled that where legal rights have been invaded, and a

federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing cases). Thus, even prior to *Bell*, the Court had held that, despite the express provision of particular monetary remedies in the Securities Act of 1933, 15 U.S.C. § 77*l*(2), a plaintiff could secure broad equitable relief as well. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-88 (1940). The Court's rationale was that "the power to make [a statutory] right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 288. The *Deckert* Court also explained that the fact that a statute "does not authorize [the remedy at issue] in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment." *Ibid.*

The presumption in favor of the availability of traditional remedies has been repeatedly reaffirmed since *Bell v. Hood*. In *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964), for example, the Court, relying on *Bell*, unanimously rejected the argument that remedies under Section 14(a) of the Securities Exchange Act of 1934 are "limited to prospective relief." *See S.I.P.C. v. Barbour*, 421 U.S. 412, 424 (1975) (describing *Borak*). Likewise, in holding that damages are available under the Civil Rights Act of 1866, 42 U.S.C. § 1982, the Court again concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). *See also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under 42 U.S.C. § 1983 even though enacting Congress did not specifically address the issue).

For present purposes, the most important examples of the Court's adherence to this presumption are its decisions

with respect to Title IX's sister statutes—Title VI and Section 504. In the Title VI case (*Guardians*, *supra*), although the Court was splintered because two separate issues were presented, its Members nonetheless generally agreed on the presumptive availability of all remedies once a private action is authorized. Thus, Justice Stevens, joined by Justices Brennan and Blackmun, found that Title VI allows for damages, concluding that it was "most improbable that Congress contemplated so significant and unusual a limitation [*i.e.*, no damages] on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute." 463 U.S. at 636 (dissenting opinion); *see id.* at 612 & n.1 (O'Connor, J., concurring).[8] Justice Marshall, expressly relying on *Bell v. Hood* and similar cases, also found that damages were available under Title VI. *Id.* at 624-28 (dissenting opinion). And Justice White, joined by then-Justice Rehnquist, acknowledged the basic presumption (citing *Bell v. Hood*), but concluded that it did not apply to Title VI cases involving *non*-intentional discrimination. *Id.* at 595. No Justice questioned the presumption.

These various opinions were harmonized one year later. Thus, in *Consolidated Rail Corp. v. Darrone*, a unanimous Court held that the 1978 amendment to Section 504—which had expressly incorporated the "remedies, procedures, and rights set forth in Title VI" (29 U.S.C. § 794a(a)(2))—authorizes a back pay award. The basis for this ruling was simply that "[a] majority of the Court [in *Guardians*] agreed that retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI." 465 U.S. at 630 (emphasis added). Indeed, "no Member of the Court [in

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[8] Justice O'Connor agreed with Justice Stevens's "reasons" and further agreed that Title VI permits back pay, but left open the question whether it allows for other monetary relief. 463 U.S. at 613.

Guardians] contended that backpay was unavailable, at least as a remedy for intentional discrimination." *Id.* at 630 n.9. Since Section 504 is read *in pari materia* with Title VI, the Court in *Darrone* concluded that Section 504 also authorizes a back pay remedy.

These two opinions thus reaffirm the traditional presumption that all remedies attach when Congress creates a private right of action. There is no other basis on which the cases could have been decided. None of the opinions in these cases found that the language or legislative history of Title VI independently demonstrates Congress's intent to provide a back pay remedy.[9] This same analysis must also be followed under Title IX, which, like Section 504, was clearly based on Title VI. *See, e.g., Cannon*, 441 U.S. at 694-96; *United States Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986).

The United States is thus fundamentally incorrect when it starts its argument in this case with the assertion that "[t]he issue of what relief is available to private parties under a statute—like the question whether any private right of action exists at all—is 'basically a matter of statutory construction.'" U.S. Br. 14 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). On the contrary, as the above decisions confirm, "the question whether a litigant has a 'cause of action' is *analytically distinct* and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979) (emphasis supplied). And the latter question has long been governed by a rule leaving the courts to apply their usual remedies to claims properly before them, not by a requirement that any particular remedy be intended by Congress before a court can award it.

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[9] With respect to Section 504, the Court in *Darrone* noted merely that its legislative history had included a "few references to [back pay that] are consistent with our holding." 465 U.S. at 631 n.10.

B. The presumption supporting the availability of remedies is entirely reasonable and should not be changed. The indisputable fact is that a court simply cannot avoid deciding what remedies are available when Congress creates a private right of action but fails to specify the available relief. Thus, given the need for some rule to govern unspecified remedies, it is clear for several reasons that the best—indeed, the only—solution is to presume the availability of all appropriate remedies.

To begin with, such a presumption reflects the commonly recognized fact that, in a merged system of law and equity, when the federal courts have jurisdiction to hear a case, they generally are *not* restricted in their ability to afford full relief. Moreover, the other potential approaches for deciding what remedies are available when Congress leaves them unspecified are plainly less palatable. First, to presume that *no* remedy is available in those circumstances would undo any statute that simply provides for a private right of action. Such judicial nullification is obviously troubling and should be avoided where possible. Indeed, even when the issue is not as serious as the destruction of jurisdiction that Congress seeks to confer, the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986) ("It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.") (internal quotation omitted). The other possible alternative to the presumption in favor of remedies is to have the courts decide afresh, on an *ad hoc* basis, which remedies properly further the "purposes" of any given statute. But that approach would only increase the law's uncertainty, while giving the courts the kind of legislative authority that they are ill-suited to exercise—and that has troubled Members of the Court in cases involving implied rights of action. *See*

Cannon, 441 U.S. at 732-47 (Powell, J., dissenting); *Thompson*, 484 U.S. at 190-91 (Scalia, J., concurring in the judgment).

On the other hand, a rule presuming the availability of traditional remedies when Congress provides a right of action does not raise the concerns that led the Court to adopt "a stricter standard for the implication of private causes of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). Specifically, there have been two reasons given for the Court's shift in approach to implied rights of action. First, "[t]he increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than [our earlier cases] had required." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377 (1982) (footnote omitted). And second, some Justices have argued that "[b]y creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation,' and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting) (internal citations and footnote omitted). *See also Thompson v. Thompson*, 484 U.S. at 190-91 (Scalia, J., concurring in the judgment).

But once it has been determined that Congress intends to allow private actions, there is no longer any question of the courts creating jurisdiction on their own. Moreover, in such circumstances, the essential policy choice about the need for litigation to vindicate statutory interests has been made by the appropriate Branch. Thus, there is simply no basis for suggesting that the presumption concerning the availability of remedies when

Congress provides a private cause of action has been—or should be—undone by the Court's recent rulings on the "analytically distinct . . . question whether a litigant has a 'cause of action.'" *Davis v. Passman*, 442 U.S. at 239.

C. The court of appeals in this case nevertheless followed a very different approach, adopting a strong presumption *against* damages because Title IX was enacted pursuant to Congress's power under the Spending Clause. Pet. App. 9-11. This analysis purported to follow Justice White's opinion in *Guardians*, which in turn rested on *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981). *See also Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 (7th Cir. 1981) (finding no damages remedy under Title IX, based on *Pennhurst*), *cert. denied*, 456 U.S. 937 (1982). According to Justice White, *Pennhurst* creates a "presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power." *Guardians*, 463 U.S. at 602. Thus, because the violation at issue in *Guardians* was not intentional, Justice White concluded that a damages remedy was unavailable.

Aside from the fact that Justice White's opinion was joined by only one other Justice, there are several reasons for not extending his analysis rejecting damages relief to the present case. Most plainly, as Justice White himself made clear, his decision was meant to apply only to "unintended violations," when it is "surely not obvious that the grantee was aware that it was administering the program in violation of the statute." 463 U.S. at 598. Indeed, Justice White expressly stated that, when intentional statutory violations are at issue, "it may be that the victim . . . should be entitled to a compensatory award." *Id.* at 597. The present case, of course, involves an unmistakable claim of *intentional* discrimination. As

this Court has observed, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting 42 U.S.C. § 2000e-2(a)(1)). The same is obviously true when a teacher sexually abuses a student.

The distinction between intentional and unintentional violations presumably allowed Justice White to join the unanimous opinion in *Darrone*, a case that respondent and the court below simply ignored. The approval of a back pay remedy in that case, which did involve intentional discrimination (465 U.S. at 628), is simply irreconcilable with the view that monetary relief is not warranted under a Spending Clause statute "where Congress has not expressly provided such a remedy as a part of the statutory scheme." Pet. App. 11. By the same token, the Eleventh Circuit's reliance (Pet. App. 10) on the quote from *Pennhurst* that "in no [Spending Clause] case . . . have we required a State to provide money to plaintiffs" (451 U.S. at 29), is also clearly mistaken after *Darrone*.

In any event, the application of *Pennhurst* to ascertain the availability of particular remedies—in contrast to determining a federal grantee's substantive obligations—is an insupportable extension. It is one thing to conclude that "[t]here can, of course, be no knowing acceptance [of a federal grant] if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. But it is an entirely different thing to argue that where, as here, the conditions of the grant are clear—*i.e.*, no sex discrimination—a recipient should be entitled to rely on the statute's nonenforcement because Congress has not specifically authorized the use of all customary remedies. On the contrary, it is far more reasonable to presume that Congress intends full enforcement when it authorizes a private action. If anything, that conclusion would appear to be especially compelling under a Spending Clause statute, where there is every reason to think that Congress would want to ensure that *its* monies have not been, and will not be, used to support discrimination.[10]

D. Application of the presumption in favor of traditional remedies to the present case compels the conclusion that damages are available to petitioner. Of course, discrimination claims have generally been found remediable through damages awards under civil rights statutes, such as 42 U.S.C. §§ 1981, 1982, & 1983. As the Court explained with respect to Section 1983, "[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. at 254-55 (internal quotation omitted) (emphasis in original). *See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971) ("[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty").

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[10] Even if there were some unique limitation on remedies available under a Spending Clause statute, we do not think that Title IX should be categorized as having been based solely on Congress's spending power. The statute rests as well on Congress's power under Section 5 of the Fourteenth Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n.5 (1985) (analyzing § 504 under both § 5 and Spending Clause). As the Court recognized in *Cannon*, Title IX, in addition to prohibiting the use of federal funds to support discriminatory practices, also sought to "provide individual citizens effective protection against those practices." 441 U.S. at 704. That view certainly reflects a traditional exercise of congressional power under the Fourteenth Amendment. Moreover, when Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, which explicitly applies to Title IX, the Senate Report explained that the statute was enacted pursuant to "Congress' powers under, *inter alia*, the Fourteenth Amendment, Section 5." S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913. *See also Cannon*, 441 U.S. at 686 n.7.

Nor can there be any question that the sexual abuse alleged by petitioner involves the kind of discrimination that causes substantial, lasting harm to its victims. Here, as in *Meritor Sav. Bank*, petitioner's allegations "include not only pervasive harassment but also criminal conduct of the most serious nature." 477 U.S. at 63. The psychological and emotional harm resulting from sexual abuse by a teacher of a student is well documented; and such harm is a familiar compensable injury in common law tort systems. *See generally* Restatement (Second) of Torts § 18 (battery); § 21 (assault); § 30 (conditional threat); § 46 (outrageous conduct causing severe emotional distress); and the illustrations provided therein.

Lastly, there is no basis for suggesting that Congress wanted to curtail the availability of any traditional remedy under Title IX. In contrast to a statute like the one at issue in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), Title IX does not contain an express private remedy.[11] *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (court may order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate") ("Title VII"). Nor has Congress provided any other reason to think that it wanted to prohibit the generally favored judicial remedy of damages. To the contrary, as we now show, all indications are that Congress intended to allow for that remedy.

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[11] As the Court held in *Cannon*, Title IX's funding cut-off provision, available to the government, plainly is not an exclusive remedy. 441 U.S. at 704-08. *See also Guardians*; *Darrone*. Indeed, given that a fund cut-off may harm many students, that remedy often would be found inappropriate for use in redressing an isolated violation—thus making individual relief all the more "necessary." *Cannon*, 441 U.S. at 706.

II. A DIRECT ASSESSMENT OF CONGRESSIONAL INTENT DEMONSTRATES THAT DAMAGES ARE AVAILABLE UNDER TITLE IX.

Apart from the presumption in favor of the availability of remedies when Congress creates a private right of action, an examination of the usual factors for discerning congressional intent when a statute is silent on an issue supports the conclusion that Title IX authorizes damages. We rely on three considerations: (a) the specific legal context in which Congress was legislating when it enacted Title IX; (b) the views of the federal agency responsible for administering the statute; and (c) the fact that interpreting Title IX as the United States does—to permit injunctions and back pay, but not damages—is insupportable.

A. The same basic considerations that led the Court in *Cannon* to hold that Congress intended to provide a private right of action under Title IX also require the conclusion that damages are available. In particular, *Cannon* relied heavily on the view that "our evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U.S. at 698-99. This Court has confirmed its adherence to that method of statutory interpretation on several occasions. Recently in *Thompson v. Thompson*, for example, the Court explained that, in ascertaining whether Congress intended to provide a right of action, "[w]e examine initially the context of the [statute] with an eye toward determining Congress' perception of the law that it was shaping or reshaping." 484 U.S. at 180. *See also Merrill Lynch*, 456 U.S. at 378 ("[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted"). The same principle of statutory interpretation has also been applied in cases involving questions other than the availability of a private right of action. *See, e.g., International Primate*

Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700, 1707 (1991) (quoting *Cannon*); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (relying on *Cannon* for "the well-settled presumption that Congress understands the state of existing law when it legislates").[12]

The legal context in which Congress was acting when it passed Title IX in 1972 could hardly have been clearer about the fact that this Court would imply a damages remedy under the statute. During that era, the Court, "following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch*, 456 U.S. at 375 & 376 (footnote omitted). It thus declined to recognize a traditional remedy only when "the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or [when] there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement." *Ibid.*

The classic formulation of this common law approach was set out in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 40 (1916), where the Court held that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." This prin-

[12] In *Thompson*, two Justices indicated that reliance on legal context in discerning congressional intent should be limited to judicial interpretations of a specific statute that is being reenacted or of a statute to which a subsequent statute is related. 484 U.S. at 188-90 (Scalia, J., concurring in the judgment, joined by O'Connor, J.). Even under that approach, as we show in text (*see* pp. 24-25 *infra*), there is support for reading Title IX to include a damages remedy.

ciple was well accepted by the time Titles VI and IX were enacted. Indeed, in 1964, in what was widely viewed as a landmark decision confirming the breadth of the *Rigsby* principle, the Court found an implied right of action for damages under Section 14(a) of the Securities Exchange Act of 1934, explaining that "it is the *duty* of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. at 433 (emphasis added). The *Borak* Court also relied on the broad language from *Bell v. Hood*, concluding that "federal courts may use any available remedy to make good the wrong done." *Ibid.*

In fact, "[i]n the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them, a cause of action was found." *Cannon*, 441 U.S. at 698 n.23.[13] A damages remedy was approved in three of those cases;[14] and in no case did the Court indicate that such relief was unavailable. Among the cases approving damages, moreover, was a major civil rights case decided in 1969, involving 42 U.S.C. § 1982, where the Court flatly ruled that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. at 239. The *Sullivan* Court further emphasized that "[t]he rule of damages, whether drawn from federal or state sources, is a federal rule respon-

[13] The six cases referred to are *J.I. Case Co. v. Borak, supra*; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Sullivan v. Little Hunting Park, Inc., supra*; and *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

[14] *See J.I. Case Co. v. Borak, supra*; *Wyandotte Transp. Co. v. United States, supra*; and *Sullivan v. Little Hunting Park, Inc., supra.*

sive to the need whenever a federal right is impaired." *Id.* at 240.[15]

In addition, during the year immediately preceding Title IX's enactment, the Court first recognized a damages remedy, not expressly authorized by Congress, for a constitutional violation. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 397. That decision rested largely on an analogy to the *established* rule in statutory cases. *Id.* at 396. *See also id.* at 407 (Harlan J., concurring) ("at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these [constitutional] interests than with respect to interests protected by federal statutes").

Furthermore, the lower courts' interpretation of Title VI of the Civil Rights Act of 1964—on which Title IX was clearly patterned—had repeatedly upheld private enforcement of the statute. *See Cannon*, 441 U.S. at 396 & n.21 (summarizing cases). None of these cases gave the slightest hint that damages were unavailable,

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[15] It is also instructive to consider the United State's *amicus curiae* brief in *Sullivan*, which set forth the governing law as follows:

> courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 98 (C.A. 8); *Bell v. Hood*, 327 U.S. 678, 684; *see also Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 569-70; *Porter v. Warner Co.*, 328 U.S. 395, 398; *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292; *State of Alabama v. United States*, 304 F.2d 583, 590-591 (C.A. 5), affirmed, 371 U.S. 37; *J.I. Case Co. v. Borak*, 377 U.S. 426, 433. Were the judicial responsibility viewed otherwise, the courts would "impute to Congress a futility inconsistent with the great design of this legislation." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492.

U.S. Br. at 36.

and in the only case to consider the issue, the court upheld such an award. *See Rolfe v. County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968). In that case, two black school teachers had been fired. After finding the defendants liable and ordering the teachers reinstated, the court held a trial on "the issue of the compensation," noting that "the burden of proving mitigation of damages was on the defendants." 282 F. Supp. at 200. The Sixth Circuit, in affirming the monetary judgment, likewise consistently referred to it as a "damages" award. 391 F.2d at 78, 81.[16]

Given this clear, contemporaneous body of law, in an area of statutory interpretation that would obviously have been of keen interest to Congress, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment [of Title IX] to be interpreted in conformity with them." *Cannon*, 441 at 699. Then-Justice Rehnquist, joining the Court's opinion in *Cannon*, wrote specifically to underscore this point:

> the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *J.I. Case Co. v. Borak*, *supra*, and numerous cases from other federal courts, gave Congress good reason to

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[16] The United States argues that in "none of the [Title VI] cases to which the [*Cannon*] Court referred . . . did the court sustain an award of *legal* damages for a violation of Title VI." U.S. Br. 16 (emphasis in original). As for the *Rolfe* case, the U.S. simply notes that "back pay" was granted. *Id.* at 16 n.13. While true, that description is nonetheless misleading. As the quotations in text make clear, both courts in *Rolfe* plainly viewed the remedy as a conventional award of legal damages.

> think that the federal judiciary would undertake this task.

Cannon, 441 U.S. at 718 (concurring opinion) (emphasis in original). *See also Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989) ("Congress undoubtedly was aware from our cases such as *Cort v. Ash*, 422 U.S. 66 (1975), that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized.").

In short, it would be unreasonable to reverse course now and not honor what appears to have been Congress's legitimate understanding about damages remedies when it enacted Title IX in 1972. As Justice Scalia remarked in the Eleventh Amendment context, "Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed." *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 496 (1987) (concurring opinion).

B. The views of the Department of Health, Education & Welfare, which was the agency responsible for administering the statute (and has now been succeeded by the Department of Education), also support our reading of congressional intent. HEW's initial regulations, still in effect, provide that "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." 34 C.F.R. § 106.3(a). There is no limit on this omnibus remedial authority and its express reference to remedying the "*effects*" of discrimination certainly brings to mind monetary relief. In accord with

that view, HEW sometimes required such relief in administrative proceedings under Title IX. *See, e.g.*, Respondent's Appendix in *North Haven School Dist. v. Bell*, *supra*, at 34 ("[r]eimbursement of [complainant] for any loss of salary or other benefits"); *Romeo Community Schools v. U.S. Dep't of H.E.W.*, 600 F.2d 581, 583 (6th Cir.) ("reimburse and adjust the salaries and retirement credits of any employees who had not been permitted to use accrued sick leave while on pregnancy related leave"), *cert. denied*, 444 U.S. 972 (1979). The Department's interpretation thus reinforces the conclusion that Congress intended to allow for monetary remedies.

C. Finally, the suggestion that Congress intended to allow the federal courts to issue injunctions and back pay remedies but no other monetary relief under Title IX (*see* U.S. Br. at 15-20) simply makes no sense. Injunctions, as an historical rule, are the *dis*favored remedy. And back pay would appear to be the least likely monetary remedy to find in a statute intended primarily to protect *students* from discrimination. Back pay, moreover, though at times denominated "equitable" for Seventh Amendment purposes, is nonetheless substantively equivalent to other kinds of compensatory damages.

1. *Cannon* makes clear that Title IX allows a federal court to impose injunctions on public or private schools, requiring them, *inter alia*, to accept applicants who have been excluded because of their sex. 441 U.S. at 705. Throughout the history of Anglo-American law, that kind of judicial relief, because of its intrusiveness, has generally been deemed appropriate *only* when damages cannot provide an adequate remedy. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 502-04 (1974). For education programs, in particular, the dislocations caused by injunctive remedies may be great, sometimes raising sensitive issues of academic freedom. *See Cannon*, 441 U.S. at 747 (Powell, J., dissenting). Compliance with such injunctions can also be very expensive. *See, e.g., Missouri v.*

Jenkins, 491 U.S. 274 (1989) (school desegregation remedy). Thus, the suggestion that Congress wanted to allow injunctive remedies and *not* damages appears doubtful at best. *Cf. also* 28 U.S.C. § 1341 (prohibiting federal injunctions against state and local taxes); 28 U.S.C. § 1342 (limiting injunctions against regulated utilities); 28 U.S.C. § 2283 (prohibiting federal injunctions against state court proceedings).[17]

2. Even if the allowance of injunctive but not compensatory relief could be defended under Title IX, as it has been in other contexts (*see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment allows only prospective relief)), there are several reasons to conclude that Congress did not authorize back pay awards under Title IX while simultaneously barring all other monetary remedies. First, there has never been any question that Title IX applies to students, whereas its applicability to employees has been hotly disputed. *Compare North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), *with id.* at 504 (Powell, J., dissenting). Yet, under the United States's view, Congress wanted to leave students without a compensatory remedy, while affording back pay to school employees. That conclusion is doubly irrational, in fact, because Congress had already granted school teachers a back pay remedy for employment discrimination under Title VII.

Moreover, although the distinction between back pay and other forms of monetary relief may have *historical* significance in terms of the right to a jury trial under the Seventh Amendment, it has little, if any, substantive

[17] The Eleventh Circuit's observation that a federal grantee may escape the effects of such costly and intrusive injunctive remedies (Pet. App. 10) is more illusory than real. Aside from the fact that most schools are heavily dependent on federal funding, including the funds received for student financial aid, an injunction designed to remedy discrimination that occurred when the grantee was receiving funds may not be so easy to undo prospectively.

importance. Back pay is simply a form of compensation for one kind of harm that an individual suffers because of discrimination. Other harms are likewise caused by discrimination and they too are also amenable to redress through compensation. Not surprisingly, therefore, this Court has frequently considered back pay to be a "damages" remedy. *See, e.g., Davis v. Passman*, 442 U.S. at 231 ("damages in the form of back pay"); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 233 (1982) (back pay claimant required to "minimize his damages").

Indeed, even in the Seventh Amendment context, the Court recently described "back pay" as "compensatory damages" and held that a suit seeking such relief against a union for violating its duty of fair representation should be tried to a jury. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1347 (1990). The Court further indicated that the different treatment for back pay under Title VII was at least in part due to the fact "Congress specifically categorized backpay under Title VII as a form of 'equitable relief.'" *Id.* at 1348 (quoting 42 U.S.C. § 2000e-5(g)). In these circumstances, the conclusion that Congress intended to draw a distinct line between a back pay remedy and other forms of monetary relief under Title IX implausibly exalts form over substance.[18]

[18] The United States suggests that "[a]n award of damages is different from an equitable make whole remedy because the latter remedy merely requires the [defendant] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it [acted in accordance with the statute]. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 370-371 (1985)." U.S. Br. at 19 n.17 (brackets in original). But the distinction is misguided and plainly not supported by the case cited. A true equitable, restitutionary remedy is one where the defendant actually gets a windfall by retaining money that belongs to the plaintiffs, such as "[a]n action for disgorgement of improper profits." *Tull v. United States*, 481 U.S. 412, 424 (1987). Likewise, in the *Burlington School* case, relied on by the United States, the local school board *retained* money that it was obligated

3. The United States offers several reasons why it believes that Congress intended to limit monetary relief under Title IX to injunctions and back pay. These arguments are not only unpersuasive but, by and large, have already been rejected. To begin with, the United States argues that "[i]t is entirely consistent with th[e] language [of Title IX] to limit the implied remedies available to a private party to those necessary (1) to restore a plaintiff who has been wrongfully excluded from a federally assisted program to full participation, (2) to reverse any denial of benefits and to restore any benefits wrongfully withheld, and (3) to eliminate unlawful discrimination." U.S. Br. at 15-16. While obviously designed to reflect the decisions in *Cannon* and *Darrone*—but no more—this assertion nevertheless *supports* a damages remedy. In its absence, there is simply no way "to restore" the "wrongfully withheld" benefit of having participated in an educational program free of sexual harassment.

The United States next claims that it would create an "anomaly" to interpret Title IX to provide for damages (beyond back pay) in employment cases, because Title VI exempts most employment cases, thus requiring a plaintiff to proceed under Title VII instead. As a result, concludes the United States, female employees would have a greater range of remedies than their black co-workers. U.S. Br. at 17-18. But that argument was already rejected when this Court ruled that Title IX, unlike Title VI, fully applies to employment discrimination. *North Haven Bd. of Educ. v. Bell*, *supra*. Indeed, in response to the assertion that Congress was unlikely to have pro-

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by federal law to pay to plaintiff. In a back pay case, by contrast, the defendant typically gets no windfall because it has paid the wages to another employee who has been hired or promoted instead of the plaintiff. Thus, while the Court has at times described back pay as a pure restitutionary award (*see, e.g., Bowen v. Massachusetts*, 487 U.S. at 894-95), that characterization appears to be overstated. *See id.* at 913-14 (Scalia, J., dissenting).

vided "a new 'remedy' for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race" (456 U.S. at 554 (dissenting opinion)), the Court simply noted that "this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Id.* at 535 n.26 (citing cases). *See also Darrone*, 465 U.S. at 631-34 (§ 504, like Title IX, contains broader employment coverage than Title VII).[19]

The United States further argues that the purpose of Title IX would be undermined by a damages remedy because "[t]he fundamental purpose of federal assistance is to make additional funds available for educational programs." U.S. Br. at 18. Pointing to the statute's funding cutoff provision, in particular, the United States asserts that "[t]he evident purpose of this scheme is to secure compliance with the statute without unnecessarily diverting resources from educational programs to litigation." *Id.* at 20. That argument was rejected in *Cannon*, 441 U.S. at 709, and is also flatly inconsistent with *Darrone*. Although Congress obviously wants federal funds to be spent on education, not litigation, its first priorities under Title IX are to "avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704.

A damages remedy is not merely consistent with—but actually *best* suited to accomplish—both of those statutory goals. Since a funding cutoff is such an extreme remedy, it is rarely, if ever, likely to be used. *Id.* at 705. Thus, if schools "faced only the prospect of an injunctive order, they would have little incentive to shun practices of

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[19] An employment discrimination claim under Title IX or Section 504, unlike one under Title VII, does not require administrative exhaustion and is subject to a longer statute of limitations. *See, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683-84 (7th Cir. 1987).

dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Moreover, for individuals like petitioner, who have already suffered injury because of discrimination prohibited by Title IX, the choice is either "damages or nothing." *Davis v. Passman*, 442 U.S. at 245. Without a damages remedy, therefore, such individuals cannot receive the "effective protection" that Congress intended to provide them under Title IX. *See also Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731-32 (1989) ("[i]n the context of the application of § 1981 and § 1982 to private actors, we 'had little choice but to hold that aggrieved individuals could enforce this prohibition, *for there existed no other remedy to address such violations of the statute.*'" (quoting *Cannon*, 441 U.S. at 728 (White, J., dissenting)) (emphasis added by *Jett* Court). To ensure Title IX's effectiveness likewise requires authorization of a damages remedy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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